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No. 90-455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL WOOD PRESERVING COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITIONER'S REPLY BRIEF

No argument advanced in Respondent's Brief In Opposition counsels against this Court's granting the Petition For Writ Of Certiorari. Despite Board Counsel's attempt to relegate the issues presented in this case to the realm of the "narrow", "fact-specific" and "fact-bound", Brief In Opposition at 7-8, this case in fact presents issues which have been the subject of persistent and divisive debate in the Courts of Appeals. It also represents the first instance in which card-based bargaining order liability imposed upon a successor employer has been presented to this Court.[1]

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[1] Carlton's Market, 243 NLRB 837 (1979), *enf'd sub nom.*

Finally, Board Counsel urges this Court to endorse a method of administrative review which so overstates the breadth of the Board's remedial discretion as to render its administrative adjudication altogether unreviewable.

1. By characterizing as an "assessment" the Board's legal conclusion that the possibility of conducting a fair election was slight, Board Counsel seeks to place this conclusion well within the Board's remedial discretion and therefore beyond the authority of a reviewing court to disturb. Brief In Opposition at 9 n. 4. However, this determination cannot withstand appellate scrutiny as it is unaccompanied by the required factual foundation. The Board conducted *no* appraisal of the effects of the unfair labor practices upon the workforce and made *no* estimate respecting the futility of traditional remedies as required by *Gissel*. 395 U.S. at 614; *see* Pet. App. 75a-76a.

While Petitioner agrees that the choice of remedy is committed to the Board's expertise, that expertise must be exercised against a factual backdrop which is sufficiently clear to enable a reviewing court intelligently and independently to ascertain whether the agency is in compliance with the directives of this Court. As stated in *Gissel*:

NLRB v. Davis, 642 F.2d 350 (9th Cir. 1981), concerned a representation petition filed simultaneously with the successor's assumption of control of the grocery, and the predecessor was not found to have committed any unfair labor practices. In NLRB v. Cott Corp., 578 F.2d 892 (1st Cir. 1978), a bargaining order had issued against the predecessor long before the successor took control of the company. *See* Ponn Distributing, Inc., 203 NLRB 482 (1973). Even in this circumstance, the court of appeals refused to impose the bargaining order upon the successor. NLRB v. Cott Corp., 578 F.2d at 896.

> It is for the Board and not the courts, however, to make that determination, *based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity.*

Gissel, 395 U.S. at 612 n. 32 (emphasis supplied).

The failure of the Board to offer any factual basis for its "assessment" of the likelihood of a fair election constitutes a gross and patent analytical omission. The Fourth Circuit clearly erred in allowing this deficiency to go uncorrected.

The Board's conclusion that General Wood had notice of the commission of serious unfair labor practices is similarly flawed. As the Fourth Circuit's discussion of this issue amply illustrates, the General Counsel presented so very few facts relating to this portion of the Board's case that reliance upon speculation and conjecture is necessary to resolve this pivotal issue. Pet. App. 20a-27a. Indeed, most of the "evidence" to which Board Counsel refers is no more than the unsupported hypotheses found in the opinion of the Fourth Circuit. Brief In Opposition at 10.

In sum, Board Counsel's analysis reflects a view of the administrative process in which there exist (a) unreviewable agency factual findings; (b) "fact-specific" and "fact-driven" "determinations" and "assessments" which are shielded from appellate review, even when they are made without benefit of any articulated evidentiary basis; and (c) remedial alternatives committed to the Board's broad discretion. Such a formalistic and stultified perspective cannot be reconciled with the prior decisions of this Court. *NLRB*

v. Brown, 380 U.S. 278, 292 (1965); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979).

2. Board Counsel challenges Petitioner's argument relating to the Board's failure to prove the union's majority status, Pet. 16-18, with the following *non sequitur*: "A successor employer's bargaining obligation depends on its hire of a majority of the predecessor's employees, not on its hire of a majority of union adherents." Brief In Opposition at 11-12. However accurate this statement might be as a general proposition, it has no relevance to the situation here presented, one in which the predecessor's employees had never chosen the union as their exclusive bargaining representative.

Each of this Court's previous successorship opinions[2] relates to a certified union with a pre-existing collective bargaining relationship with the predecessor employer. Indeed, one of the central issues in *Fall River* was whether the certification had to be "recent" in order to carry forward the presumption of majority status, inasmuch as the *Burns* successorship test contained language relative to "recent certification." *Fall River*, 482 U.S. at 36-37. As this Court explained, certification carries with it a presumption of majority status, and "where . . . the union has a rebuttable presumption of majority status, this status

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[2] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972); Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987).

continues despite the change in employers." 482 U.S. at 41.[3]

Because Bowlby had never been subject to a bargaining obligation and therefore the union enjoyed no presumption of majority status, the Fourth Circuit's strained arithmetic exercise aimed at establishing majority union support in the proposed unit is not *dictum*, as Board Counsel claims. Brief In Opposition at 12 n. 9. Rather, it is clear that the Circuit Court, implicitly conceding that the Board's analysis in this regard was flawed, advanced two distinct theories which would have the effect of salvaging the agency's imposition of a bargaining order against General Wood. Under the court's first proposal, the manipulation of the composition of the proposed bargaining unit, including the constructive hiring and dismissal of employees, produced a bare majority of employees who at one time had signed a petition seeking the opportunity to vote in a representation election. Pet. App. 36a-39a.

The second thesis is even more extraordinary: The court concludes that General Wood's failure to hire seven signatories to the petitions constituted "hallmark violations", warranting a bargaining order even in the absence of proof of majority status. Pet. App.

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[3] If, as this Court said in *Fall River*, the Board's analysis in a given case must "keep[]in mind the question 'whether those employees who have been retained will understandably view their job situations as essentially unaltered,'" Fall River, 482 U.S. at 43, the employees' perspective in this case has been wholly disregarded by the Board and the court below. Bowlby employees were *not* represented by a union; they had never voted on union representation; consequently they had no "legitimate expectations in continued representation by their union." *Id.*

41a-44a. Neither of these alternative justifications can find support in, or be premised upon, the agency decisions under review. Consequently, General Wood's reliance upon *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), is entirely appropriate, and Board Counsel's attempted dismissal of that argument is without substance.

In conclusion, Board Counsel's attempt to portray the issues presented by this case as disputes of fact, unworthy of review by this Court, is unavailing. The Petition presents this Court with the opportunity to resolve longstanding differences among the circuit courts respecting review of Board action and to clarify the contours of successorship analysis. The petition for writ of certiorari should be granted.

Respectfully submitted,

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